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JONES AND OTHERS

vs.

VIRGINIA STATE BOARD OF CANVASSERS.

No. 189—In Prohibition.

SELDEN AND OTHERS

vs.

SAME.

No. 190—In Equity.

Argument of William A. Anderson, Attorney-General of Virginia, before the Supreme Court of the United States, in the Virginia Suffrage Cases above mentioned, on behalf of the Defendants, and of the Commonwealth of Virginia. Final Argument April 4th and 5th, 1904.

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No duty has yet or is likely ever to come to me in my lifetime which involves graver responsibility than that which I have to meet to-day, and in its discharge I bespeak the indulgence and kindly consideration of the court; for it is impossible for me, as it would be for an advocate far more gifted than I, to present in all its just strength and power the cause of Virginia as its merits and the truth entitle that cause to be presented here.

It is impossible to read the records in these cases, or to consider the fierce invective of the written and the oral arguments of the counsel for the plaintiffs, without perceiving that these suits are in substance and in fact suits against the State. To be sure the State is not made a party defendant by name—her Governor and the other general officers of the State at the capital being made the nominal defendants—but her officers are sued in their official and governmental capacities, under circumstances which present a case which it would be difficult to find not to be a suit against the State if any suit could ever be so considered. It is the government of Virginia, and not the persons composing that government in their individual or non-representative character, which has been attempted to be arraigned at the bar of the court below, and which has been assailed with so much bitterness in this court.

Let us briefly review the various steps in the argument of the counsel for appellants.

He rests his case upon the following propositions:

> First. That the Constitution enacted by the convention which met in the city of Richmond on June 12, 1901, is not the Constitution of that State, but is an absolutely invalid act and a nullity—
>
> (1) Because the members of that convention failed to take any oath, and
>
> (2) Because that Constitution has never received the sanction of the electorate which chose the members of the convention.
>
> Second. That even if the Constitution enacted by the convention is in other respects a valid constitutional enactment, yet the suffrage article (Article II. of said Constitution) is invalid or unconstitutional—
>
> (1) Because it is in contravention of the following "fundamental condition" prescribed by Congress in the act of January, 1870, admitting

Virginia to representation in the Congress of the United States, viz.:

"That the Constitution of Virginia shall never be amended or changed so as to deprive any citizen or class of citizens of the United States of the right to vote, who are now entitled to vote by any Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law."

(2) Because the provisions of this suffrage article are in conflict with the fifteenth amendment to the Federal Constitution.

Third. That it necessarily follows that the registration of the voters of the Commonwealth had in the year 1902, pursuant to the terms of said pretended Constitution, and the registration ordinance adopted by the convention, and the election of congressmen held in November, 1902, by the voters so registered, were invalid and void.

Fourth. That the plaintiffs in these two suits in the court below were citizens of the United States and of the State of Virginia, and qualified voters of the State in the year 1902, and were unlawfully deprived of the right to register and to vote at said election, and are entitled now to have said Constitution, and particularly Article II. thereof, and the registration ordinance enacted in connection therewith, adjudicated in these causes to be void and unconstitutional acts and nullities; to have said election declared by the court to have been illegal and void; and to have by an injunction in the one case, and a writ of prohibition in the other, the Governor of Virginia and the other general officers of the State at her capital, constituting her State Board of Canvassers, enjoined and prohibited from canvassing

> the returns of said election and giving certificates of election to the persons shown by said returns to have received the majority of the votes cast in their respective congressional districts.

A discussion of these several propositions is proper in order to show that the plaintiffs have no substantive personal grievance which entitles them to implead the defendants upon any such state of facts; that the Circuit Courts of the United States have no jurisdiction of any such questions or subject matter; and that, even if the plaintiffs ever had any such grievance or cause of action against these defendants, it is absolutely impossible for any court in any such proceeding to grant substantial relief or to afford any redress, under the circumstances of the case, for such supposed injuries and grievances.

I.

The contention that the convention and its acts were invalid is based upon a misapprehension of the law, and upon a singular mistake as to the facts upon which it is founded.

As to the claim so earnestly relied upon that it was the duty of the members of the convention to take the oath of office prescribed in the Constitution in force at the time of their election, it is only necessary to say that that oath was required by that Constitution only of *officers of the State government*, and I have been able to find no authority anywhere that has ever held that members of a constitutional convention are officers of a State government. They are the deputies and representatives of the people in their sovereign capacity, clothed with broad and comprehensive powers, without any limit to their tenure of the representative position to which they are chosen; and the very purpose for which they are chosen—namely, to amend and alter the existing constitution of government—would seem to make it incongruous, if not improper, for them to take an oath to support and carry out the provisions of the very instrument which it is their business to revise and alter.

As stated by Mr. Jameson, of the whole number of State constitutional conventions whose proceedings were accessible to him, "about one-half only have administered an oath." Jameson on Constitutional Conventions, secs. 277-282.

This is a question of Virginia law, as to which the precedents furnished by that Commonwealth should be at least influential; and neither the members of the Virginia Constitutional Convention of 1776, nor of that of 1829, nor of that of 1850, considered it obligatory upon them to take any oath whatever.

There was no provision in the preceding Constitution of Virginia requiring the members of a constitutional convention to take an oath. There was such a requirement in the fourth clause of section 1 of Article III. of that Constitution as originally framed by the Reconstruction Convention; but that clause was stricken out of the instrument by a majority of nearly 40,000 in the popular vote cast at the election at which that Constitution was adopted.

Even if there had been such a requirement in the former Constitution as is contended, it would have been *ultra vires* and void, because, if such a provision in a Constitution is valid and binding it would be competent for the people of one generation to tie the hands of their posterity in all future generations in respect to the exercise of the primary, fundamental, and inalienable right of changing and altering their constitutions and institutions at pleasure.

But even if it could be fairly claimed that it was obligatory upon the members of the convention to take an oath, their refusal to do so would not impair the validity of their otherwise valid acts. This would seem to be settled by the following authorities:

Gonzales v. *Ross*, 120 U. S., 605;
In re Ah Lee, 6 Sawyer, 410;
Duncan v. *McCall*, 139 U. S., 449, 462;
Mechem on Public Officers, secs. 329, 330, 255, 262;
Throop on Public Officers, sec. 630.

Nor does the second ground relied on—namely, the fact

that the Constitution of 1901-2 was ordained without its submission to the vote of the people—render it invalid. This will appear from an examination of the provisions of the former Constitution of Virginia, in force when the convention met.

The provisions of Article XII. of that instrument, controlling this subject, are as follows:

"ARTICLE XII.

"FUTURE CHANGES IN THE CONSTITUTION.

"Any amendment or amendments to the Constitution may be proposed in the Senate and House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes taken thereon and referred to the General Assembly to be chosen at the next general election of senators and members of theHouse of Delegates, and shall be published for three months previous to the time of making such choice. And if, in the General Assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people in such manner and at such times as the General Assembly shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the General Assembly voting thereon, such amendment or amendments shall become part of the Constitution.

"At the general election to be held in the year 1888, and in each twentieth year thereafter, and also at such time as the General Assembly may

> by law provide, the question, 'Shall there be a convention to revise the Constitution and amend the same?' shall be decided by the electors qualified to vote for members of the General Assembly; and in case a majority of the electors so qualified voting at such election shall decide in favor of a convention for such purpose, the General Assembly at its next session shall provide by law for the election of delegates to such convention." * * *

It will be seen that two (2) methods were prescribed by that Constitution for its amendment—one by the General Assembly, and the other by a constitutional convention. The first is provided for by the first paragraph, and the second by the second paragraph, of that article; and an inspection of those provisions will show the difference between an amendment to be accomplished by legislative initiative, and amendments to be effected by constitutional enactment; and the contrast and striking difference between the requirements in the one and in the other case will make apparent the distinct purpose of the Constitution and its meaning and effect in these particulars.

In the one case, the Legislature was merely authorized to propose amendments. Such amendments had to be approved and proposed by two successive General Assemblies, and then to be sanctioned by the popular vote, before they became a part of the organic law of the State.

In the other case, by the second paragraph of Article XII., the judgment and authority of the people of the Commonwealth were to be invoked upon the distinct proposition, in the language of the Constitution: "Shall there be a convention to revise the Constitution and amend the same?" If the voice of the people, at the election held to obtain their will upon this question, was in the affirmative, all that the General Assembly was required or authorized to do, by the express limitations of that Constitution was that, "at its next session," it should

"provide by law for the election of delegates to such convention." It was not competent for the General Assembly to prescribe any terms and conditions for the execution by the convention of the will of the people thus expressed at the polls.

The power and authority confided by the people in the delegates thus to be chosen was derived in no sense and no degree from any act of the General Assembly, but from the direct delegation of that power by the sovereign act of the people. The power thus conferred upon their deputies was not to formulate and propose amendments to the Constitution, but a plenary power "to *amend* and *revise* the Constitution," without limitation or restriction, except such as were created by the Constitution of the United States. Any action of the Legislature inconsistent with this plain and dominating provision of the Constitution was clearly *ultra vires*. So that we see that, as a conclusion to be derived from the language of the former Constitution itself, and from the express grant of power by the vote of the people, the convention was clothed with the complete authority and the duty of amending and revising the Constitution, and it was not incumbent upon it to submit its work to any popular vote for approval or rejection.

The *Legislature* could only *propose* amendments, which were inoperative until sanctioned by the votes of the people. The *Convention* was empowered to revise and amend by its own act.

Like the question as to the necessity for taking an oath, this also is a question of Virginia law, and the position for which we contend is sustained by the Virginia precedents and decisions.

In *Kamper* v. *Hawkins*, 1 Va. Cases, 20, it was decided by the Supreme Court of Virginia that the Constitution of 1776 (the first Constitution of Virginia), which was enacted by the convention of that year and was never submitted to a popular vote, was a valid enactment, and was the organic law of the Commonwealth.

But even if the contention of plaintiffs' counsel was well founded as of the date of the enactment of the Constitution,

there is no Federal question here; nor can there be any longer any question anywhere as to whether the Constitution of 1901-2 is the organic law of Virginia, for the reason that every department of the government of that State has recognized and accepted that instrument as the Constitution of the Commonwealth.

The members of the General Assembly, elected before its adoption and recognized and admitted to have been a *de jure* body, accepted it, as is shown in the record, not only by the solemn act of all of its members except one in taking the oath to support it, but by the formal resolution they adopted, accepting it as the Constitution of the State, and by 606 acts passed in pursuance of, many of them distinctly in execution of, its provisions, found in the acts of the extra session of 1902-3.

The Governor formally recognized it by the proclamation convening the General Assembly, issued by him in pursuance of the terms of the Constitution, and all the executive officers of the State recognized it by taking the oath to support that instrument as the organic law of the State.

And the judicial department of the Commonwealth, as appears in the record, has recognized and "attorned" to it, by reason of the fact that every judge of the Commonwealth has taken the oath to support that Constitution.

But the question as to whether a particular enactment is the Constitution of a State is peculiarly and essentially a State question, and the decision of the highest court of that State is final and conclusive as to all the people of the State, as to the State and Federal courts, and as to the world, upon that subject.

What is the law of a State, whether organic or legislative, is a question concluded by the decision of the highest court of such State. This is established by the following adjudications of this court:

Luther v. *Borden*, 7 How., 1;
Baldwin v. *Kansas*, 129 U. S., 57;
Walker v. *Sauvinet*, 92 U. S., 92;
Duncan v. *McCall*, 139 U. S., 449.

The distinct question whether this Constitution is the organic law of Virginia arose in the case of *Taylor* v. *Commonwealth* (44 S. E. R., 754, and Virginia Law Register for September, 1903, p. 381)), and it was settled by the unanimous opinion of the Supreme Court of Appeals of Virginia in the affirmative.

In *Luther* v. *Borden* (*supra*), Chief Justice Taney, in the opinion of the court, said:

> "The point then raised here has been already decided by the courts of Rhode Island. The question relates altogether to the Constitution and laws of that State, and the well-settled rule in this court is that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the Constitution and laws of the State."

And this rule is stated, with even greater emphasis, by Mr. Justice Woodbury (who dissented upon other grounds) in his opinion (7 How., 58).

> See also *Elmendorf* v. *Taylor,* 10 Wheat., 159;
> *Bank of U. S.* v. *Daniel,* 12 Pet., 32.

II.

Having shown that the claim of appellants, that the Constitution of Virginia is a nullity, is unfounded, we come now to consider the second of their main contentions—namely, that the suffrage article (Article II.) is invalid.

(1) This claim is based—first, upon the ground that the Article referred to is in violation of the "fundamental condition" prescribed by Congress for the admission of Virginia to representation in that body. And, to sustain this contention, he insists with great earnestness that the State accepted and

pledged her faith to observe this "fundamental condition;" and, secondly, that it was in the power of Congress to impose such a condition, with or without the consent of the State, and that it is binding upon her and her people forever.

It is a sufficient answer to the first statement to say that it is not true in fact. The State could only bind herself, if she could be bound at all in any such matter, by some contemporaneous act of her General Assembly. The acts passed by the General Assembly of Virginia at the session of 1869-70, covering the period of the admission of her representatives into Congress, do not contain a line or a syllable which can be construed as an acceptance on the part of Virginia of said "fundamental condition," nor has any act or resolution ever been passed, or anything ever been done, by the General Assembly, or by any official of Virginia authorized in any sense to represent her or to act for her, by which she has ever accepted the terms of the alleged "fundamental condition," or expressly or by implication pledged her faith to its observance. Indeed, an examination of the journals of the General Assembly will show that no such resolution, bill or proposition was ever *offered* in either body.

If Mr. Zeph Turner or anyone else undertook, as appellants claim, to commit Virginia to any such proposition, any such action on his or their part was absolutely unauthorized by the State or any duly constituted authority of the State, and was utterly null and void.

All that the General Assembly did in the premises was, in compliance with the terms of the Reconstruction Acts to ratify the fourteenth and fifteenth amendments proposed by Congress to the Federal Constitution. That was done in good faith, and those amendments have ever since that time been recognized in Virginia by her legislative, executive, and judicial officers as binding upon the Commonwealth as parts of the supreme law of the land.

But even had the General Assembly undertaken to pledge the people of this Commonwealth to accept and observe forever

the terms of any "fundamental condition" such action would have been absolutely *ultra vires,* nugatory and void.

It was not competent for Congress to adopt a "fundamental condition" for Virginia which should be a part of her organic law. It was not competent for the General Assembly of Virginia to adopt an enactment which should be a part of her organic law. It was not competent for Congress and the General Assembly, both together, to adopt such a "fundamental condition" and make it binding upon the State.

Indeed, it would not have been competent for a Constitutional Convention of Virginia to have embodied in the organic law of the State a provision which would tie the hands of the people of this Commonwealth for all future time, in reference to a matter as to which each generation, or the people of the State at any time, have an absolute right to decide for themselves.

The right of the people to alter and amend their constitution of government is inalienable and absolute, subject only to the limitations of the Federal Constitution—a right which is an essential attribute of the sovereignty and freedom of any people.

It would not have been competent for Congress to have prescribed such terms as a condition for the admission *of a State into the Union* in such a way as to bind the people of that State after their admission into the Union.

In *Escanaba, &c., Co.* v. *Chicago,* 107 U. S., 678, it was held that—

> "Whatever limitation was placed upon the power of Illinois as a government and while in a territorial condition, either by the ordinance of 1787 or the legislation of Congress, such limitation ceased to have any operative force except as voluntarily adopted by her after she became a State of the Union."

Any other conclusion would make this a Union of unequal States—of States, some possessing all the attributes of sov-

ereignty and governmental freedom, subject to the provisions of the Federal Constitution, but others stripped of some of those essential powers, by statutes passed by Congress, without their consent, and in the exercise of a power which was never delegated to the Federal Government.

In the case from which I have just quoted, Mr. Justice Field, in delivering the opinion of the court, said:

> "Equality of constitutional right and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same powers over rivers in her limits that Delaware exercises over Blackbird creek and Pennsylvania over Schuylkill river." Citing *Pollard* v. *Hagan*, 3 How., 212; *Permoli* v. *First Municipality*, 3. How., 589; *Strader* v. *Graham*, 10 How., 82.

And the above adjudication is approved in *Hamilton* v. *Vicksburg R. R. Co.*, 119 U. S., 284; *Huse* v. *Glover*, 119 U. S., 546; *Sands* v. *Manistee, &c., Co.*, 123 U. S., 296.

And in *Bolln* v. *Nebraska*, 176 U. S., 83-88, this court said in its opinion, delivered by Mr. Justice Brown:

> "But this court has held in many cases that whatever be the limitations upon the power of a territorial government, they cease to have any operative force, except as voluntarily adopted, after such territory has become a State in the Union. Upon the admission of a State it becomes entitled to and possesses all the rights of dominion and sovereignty which belonged to the original States, and, in the language of the Act of 1867, admitting the State of Nebraska, it stands 'upon an equal footing with the original States in all respects whatever.'" Citing *Card-*

well v. *American Bridge Co.*, 113 U. S., 205; *Willamette Iron Co.* v. *Hatch*, 125 U. S., 1; *Ward* v. *Racehorse*, 163 U. S., 504.

But the case of Virginia is far stronger than that of Illinois and the States embraced in the Northwest Territory, and included in the scope of the ordinance of 1787.

In her case it was not a question of her admission into the Union, as counsel seems to argue, but the question of denying her representation in Congress.

From the adoption of the Federal Constitution to the present time, as has been repeatedly settled by the decisions of this court, she has never been out of the Union.

Being a State in the Union, she was, by the express terms of the Constitution of the United States, entitled to representation in Congress, without any condition whatever. It was her absolute right, and, when Congress undertook to impose any conditions upon the exercise of that right which did not apply, under the Constitution, in equal measure to every other State of the Union, its action was absolutely void. Virginia has treated that condition as a nullity, and the decisions of this court fully justify her in this.

Virginia does not occupy any inferior position in this Union to that of her sister States.

I may, I hope, be pardoned for saying here that she was one of the makers of this Union, and that, but for the services and sacrifices of her people, the Union would never have existed.

She is a State of this Union coequal with any of her sister States.

If anything has ever been settled, or can be settled, by decisions of this court, that proposition has been settled; and it has never been, and can never be, successfully denied. That this is, and of right should be, a Union of equal States—equal in political rights, equal in governmental powers—has been established forever (if it ever could have been questioned) by the great opinion of Mr. Chief Justice Chase in *Texas* v. *White*,

7 Wall., 700. Among other doctrines enunciated in that decision was the declaration:

> "THE CONSTITUTION, IN ALL ITS PROVISIONS, LOOKS TO AN INDESTRUCTIBLE UNION, COMPOSED OF INDESTRUCTIBLE STATES."

Or, as it has been elsewhere formulated, *"an indissoluble Union of coequal and indestructible States."*

When this truth ceases to be a vital and controlling principle in the jurisprudence and life of the nation this government will cease to exist as a free republic.

If appellant's counsel is right in his contention, then this court was wrong in its decision in *Virginia* v. *West Virginia*. 11 Wall., 39, when it was decided that the government of Virginia—sometimes called "the Peirpoint government"—which gave its consent to the formation of the State of West Virginia was the lawful government of Virginia. If counsel is right in his view that the Reconstruction acts were valid enactments, then West Virginia was indeed, in the trenchant language of his illustrious father, "the bastard child of a political rape," and that State has never had a legal existence. If the government of Virginia which the Reconstruction acts overturned was not a legal government of Virginia, then no legal government of that State ever gave her consent to the establishment of the State of West Virginia, or to the cession to that State of the counties of Jefferson and Berkeley, for the State government which those acts and the United States army, acting in obedience to their mandate, overthrew, as being a pretended and illegal government, not even republican in form, was the same government which gave Virginia's consent to the formation of the State of West Virginia out of her territory.

It makes no difference to the case of Virginia, as presented here in these suits, how the appellants get out of this dilemma, or whether they get out at all, for the record concedes, what

may not be controverted, that her government in 1901, 1902, and 1903, the period when all the acts complained of are alleged to have been perpetrated, was a lawful government, and that all of the defendants in these suits in the court below were the *de jure* officers of a *de jure* State government.

If the Reconstruction acts were constitutional, the appellants cannot question the legality of the State government. If they were unconstitutional, they are estopped by the admissions in their pleadings from questioning the validity of that government.

THE SUFFRAGE ARTICLE.

We come now to consider the most important of the grounds relied upon by the appellants—namely, that Article II., the suffrage article, is invalid because in violation of the fifteenth amendment to the Federal Constitution.

Their contention is that this article deprives them and other negro citizens of Virginia of the right to vote "on account of race or color."

Let us see if this charge is sustained.

It cannot be denied that the States of the Federal Union, and the States alone, can determine who shall be invested with the duty, the privilege, the trust, and the right of suffrage, and that the only limitation upon this power in the States is that prescribed by the fifteenth amendment.

It has been settled by this court that the fifteenth amendment created no voters; that it conferred the right of suffrage upon no citizen; that its purpose, meaning, and effect were simply to prohibit the States from denying or abridging the right of any person to vote "on account of race, color, or previous condition of servitude."

Subject to this limitation, the control by the States of the matter as to who shall vote is absolute.

It is true also that those citizens of the State who have been given the right to vote for members of the most numerous branch of its legislature are, by clause 1, section 2, Article I., of the Federal Constitution made Federal electors, and are as-

sured thereby of the right to vote for representatives in Congress; but this right, though founded in and assured by the National Constitution, is primarily derived from the State, and does not exist where the State has withheld the grant of such right for any cause or upon any ground, other than the race, color, or previous condition of servitude of its citizens.

It follows logically and necessarily from these propositions that the States may, within their respective jurisdictions, prescribe any qualifications for suffrage which do not discriminate against any of its citizens because of their race, color, or previous condition of servitude; and it also necessarily follows that it is competent for the State, in determining what the qualifications of its voters shall be, to fix as tests of fitness characteristics which, though possessed by white and colored citizens, are possessed by the whites in larger proportion than by the blacks, as, for instance, the qualifications of intelligence, military service in time of war, the ownership of property, or any other qualities or attributes which are not based on race, color, or a former state of servitude. Indeed, almost any tests of fitness which could be prescribed for the exercise of this right would necessarily apply in diverse proportions to the white and the colored citizens of the State.

These propositions are established by the following decisions of this court:

United States v. *Reece*, 92 U. S., 215;
United States v. *Cruikshank*, 92 U. S., 542;
Minor v. *Happersett*, 21 Wall., 162;
United States v. *Harris*, 106 U. S., 637;
United States v. *Miller*, 107 Fed. Rep., 915;
Lackie v. *United States*, 107 Fed. Rep., 114, and
Williams v. *Mississippi*, 170 U. S., 213.

A careful examination of the Virginia suffrage article will show that none of its provisions is repugnant to the above cardinal rules of constitutional validity.

The qualifications prescribed by that article, so far as they are impugned in these suits, are:

I. The requisites as to citizenship, sex, residence, &c., prescribed in section 18, which is as follows:

> Sec. 18. Every male citizen of the United States, twenty-one years of age, who has been a resident of the State two years, of the county, city, or town one year, and of the precinct in which he offers to vote, thirty days next preceding the election in which he offers to vote, has been registered and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; but removal from one precinct to another, in the same county, city, or town shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days after such removal.

These requirements are universal, and apply to all races, and colors, and conditions alike.

II. For the voters enrolled by the general registration to be made in 1902 and 1903, the qualifications are prescribed as follows:

> Sec. 19. There shall be general registrations in the counties, cities, and towns of the State during the years nineteen hundred and two and nineteen hundred and three, at such times and in such manner as may be prescribed by an ordinance of this convention. At such registrations every male citizen of the United States having the qualifications of age and residence required in section eighteen shall be entitled to register, if he be:

First. A person who, prior to the adoption of this constitution, served in time of war in the army or navy of the United States, of the Confederate States, or of any State of the United States or of the Confederate States; or

Second. A son of any such person; or

Third. A person who owns property, upon which, for the year next preceding that in which he offers to register, State taxes aggregating at least one dollar have been paid; or,

Fourth. A person able to read any section of this constitution submitted to him by the officers of registration and to give a reasonable explanation of the same; or, if unable to read such section, able to understand and give a reasonable explanation thereof when read to him by the officers.

A roll containing the names of all persons thus registered, sworn to and certified by the officers of registration, shall be filed for record and preservation, in the clerk's office of the Circuit Court of the county, or the clerk's office of the Corporation Court of the city, as the case may be. Persons thus enrolled shall not be required to register again, unless they shall have ceased to be residents of the State, or become disqualified by section twenty-three. Any person denied registration under this section shall have the right of appeal to the Circuit Court of his county or the Corporation Court of his city, or the judge thereof in vacation.

These provisions were *alternative and independent in their operation*, and conferred the right to vote upon—

(1) Every citizen, white or black, who served as a soldier on either side in the Civil War, or in the army or navy of the

United States in any other war in which the country has been heretofore engaged;

(2) Every citizen, white or black, who is the son of any such soldier;

(3) Every white or colored citizen who was, in 1902 or 1903, the owner of property on which States taxes aggregating as much as one dollar were paid for the preceding year;

(4) Every citizen, white or colored, who can read and, whether he can read or not, can understand and give a reasonable explanation of a section of the Constitution submitted to him by the registration officers.

It will be seen that there is no discrimination or distinction in any of these clauses on account of race or color.

Let us briefly consider them in their order.

1. The qualification based on military service applies alike, though in different proportions, to the white and colored citizens of the State.

According to the Historical Register and Directory of the United States Army (Vol. 2, p. 285), there were 151,337 negro soldiers enlisted in the United States army during the Civil War. I have been unable to ascertain what number of these were from Virginia; but, from the proximity of the entire State, at various periods of that struggle, to the lines of the Federal armies, and the fact that large portions of her territory were within the Federal lines, it is fair to assume that Virginia, which had nearly one-eighth of the total colored population of the country in 1860, furnished at least one-eighth of these colored soldiers.

The total colored population of the country in 1860 was 4, 441,830, of which 548,907 were in Virginia. (Compendium of 12th Census U. S., Vol. 1, pp. 115 and 12.)

There were also a number of colored soldiers from Virginia in the Spanish-American War, and some also in the Indian wars.

All of these who survive, and also all of the 150,000 colored soldiers from any part of the country, and their sons, who

were living in Virginia in 1902 or 1903 for the requisite period, were made voters.

There is, accordingly, no racial discrimination in these provisions. They automatically admit to the right of suffrage thousands of colored men and thousands of white men.

It is true that they admit many more white than colored voters, but this is because many more white than colored men have either been soldiers in time of war, or are the sons of such soldiers.

Nor can there be any sound objection, upon any account, to allowing all men, who have served their people in time of war, to have a voice in the government of their State.

Those who have risked their lives in the service of their country have the strongest claims to such recognition.

2. There is no constitutional objection to admitting the sons of veterans to the right to vote. It is not prohibited by anything in the Federal Constitution.

This class of citizens and their fathers are not made electors because they or their fathers were white soldiers, or were colored soldiers, but because the fathers perilled their lives in defence of their people.

The expediency, the wisdom, or the justice of these provisions are not questions for any court, but it is proper that I should point out here that the provision under discussion was not based upon any consideration of favoritism, nor was it a capricious or arbitrary exercise of power.

It was considered that, as a rule, it would be wrong to deny the right of suffrage to the sons of the gallant men whose heroic qualities and patriotic and self-sacrificing services, in every contest in which the country has been involved, entitled them to the gratitude and just consideration of their countrymen.

As to the sons of the veterans of the Civil War, there were considerations which went far to justify this clause of the Virginia suffrage plan.

The Virginians who survived the Civil War were generally too poor to give their children the benefits of education. There was then no system of public education at all, nor any common

school system established for a number of years after the close of that struggle.

Without any fault of theirs or of their parents, many of the sons of these veterans had no opportunity whatever to obtain the education necessary to enable them to comply with the otherwise just and reasonable educational qualification prescribed as a permanent requisite to the right to register and vote.

Many of these young men were the sons of soldiers who had lost their lives in battle or by disease during the Civil War, or had survived it with maimed bodies; or, if unharmed in body, without education and without fortune, to confront the ordeal of a desperate struggle for subsistence for the wives and children who, in the midst of a desolated land, fondly awaited their return to their humble homes.

It was believed to be right not to deny suffrage to the sons of such men.

Whether the Constitutional Convention did or did not err in this, its action in this regard was clearly not in conflict with the fifteenth amendment or any provision of the Federal Constitution, and cannot be brought in question in this court.

3. The small property qualification prescribed entitled a very large number of both white and colored citizens to the right of enrollment and of suffrage.

Every white man and every negro who possessed the requisites as to age and residence, and who owned property of any kind on which a tax of as much as one dollar had been paid during the preceding year, was thus admitted to suffrage.

The State tax rate was then forty cents on the $100 of assessed values, so that the effect of this clause was to automatically give the right to vote to all male citizens who owned property of any kind of the aggregate value of $250, on which State taxes had been paid for 1901 or 1902.

Under this provision, many thousands were admitted to the permanent electorate. By far the greater number of these were whites, but there were, as the public records of the State show, thousands of negroes who owned property of the requi-

site value to entitle them to register and vote under this requirement.

There was no color in this provision. The voters whom it enfranchised were not given suffrage because they were whites, or because they were negroes, but because they had such a stake in the Commonwealth, or, in the language of the immortal Bill of Rights of Virginia, because they afforded "sufficient evidence of permanent common interest with and attachment to the community" to entitle them to be clothed with the power, the responsibility, and the trust of suffrage.

A very large majority of the citizens of the State of voting age were, as can be shown, embraced within the terms of the three clauses thus rapidly reviewed, but there remained quite a large number who were neither soldiers nor sons of soldiers, nor owners of property worth two hundred and fifty dollars.

These included a considerable number of men who owned little or no property, some of them more or less educated, others of them without the education of books, but good, intelligent, and worthy citizens, justly entitled to be intrusted with the right of suffrage.

They also embraced the large number of ignorant and vicious men of both races, but, as the census of illiteracy and the statistics of crime show, belonging most largely to the colored population. Among these were the very numerous class known as "cornfield negroes," and also the troublesome and vicious class of negroes, some in the country, but more largely frequenting the towns, who, while ignorant and unmindful of the duties of good citizenship, often had a smattering of education.

The dense ignorance and mischievous traits and propensities of these men rendered it dangerous to the peace and well-being of society to place in their hands a power which they were incompetent to use except to the detriment of the State and to their own serious injury.

The manifest purpose of the convention was, as far as practicable, to get rid of ignorant and debased suffrage and conditions which were a menace to the civilization of the State, and

were injurious as well to the colored as to the white population of the Commonwealth.

The Constitutional Convention, therefore, adopted the qualification expressed in the fourth subdivision of section 19, as a means for excluding, as far as practicable, those who were utterly unfit for the exercise of this most important duty of freemen, and at the same time for enfranchising the intelligent, though often uneducated, citizens who understand the duties of citizenship and can be safely entrusted with the ballot.

This clause admits to suffrage:

> 4. A person able to read, or, whether he can read or not, to understand and give a reasonable explanation of any section of the Constitution submitted to him by the officers of registration.

This is an intelligence qualification, designed to exclude from the electorate citizens who were unfit to be enrolled as voters.

It applies alike, and without any discrimination, to whites and blacks.

If it debars negroes from the right to vote, it does this, not on account of their race or color, but on account of their ignorance of the ordinary duties of citizenship under the government under which they live.

If it shuts out from suffrage more of the negroes than it does of the whites, as is undoubtedly its purpose and effect, it does this because their are many more ignorant negroes and many more negroes who have no conception or comprehension of the government and institutions, and of the simplest and plainest provisions of the organic law of the State, than there are white men who are so profoundly ignorant and incompetent.

Nor is this remarkable. On the contrary, it would be passing strange if the men of that virile Caucasian stock, who wrested Virginia from the wilderness and the savage and founded a civilization there which has radiated its influence to the farthest bounds of the republic, who are sprung from and have enjoyed the inherited benefit of the experience and training of the most

masterful of all the races of mankind, come down to them through the vicissitudes, the trials, and the triumphs of a thousand years, did not possess more of intelligence and more of governmental capacity and comprehension of the duties and the laws of citizenship than the mass of the less fortunate and less richly endowed negro race—"a child-race"—which, as a rule, has had less training and less preparation for citizenship than had the ancestors of their white fellow citizens ten centuries ago.

Whatever else may be said of this "understanding" clause—and there has been much of gratuitous invective wasted in its unjust denunciation—it is beyond any question absolutely free from any repugnance to the fifteenth amendment to our Federal Constitution. Nor is there any other inhibition of that Constitution which it contravenes.

But the question here discussed is no longer an open question in this country. This identical question arose and was settled by the unanimous decision of this court in *Williams* v. *Mississippi*, 170 U. S., 213.

The clause in the Virginia Constitution now being considered is, in the particulars in which the appellants have attempted to impeach it, the same, in meaning and effect, as the clause of the Mississippi Constitution, which was reviewed and sanctioned by this court in *Williams* v. *Mississippi*—the only difference material to the present discussion being one favorable to the Virginia clause—namely, that it is made to operate for less than eighteen months, while that of Mississippi was prescribed as a permanent qualification for suffrage.

The convention evidently had the Mississippi suffrage clause and the decision of this court in *Williams* v. *Mississippi* in view when it adopted this provision substantially in the language of the Mississippi Constitution.

The Mississippi clause is as follows:

> "Sec. 244. On and after the first day of January, A. D. 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the Constitution of the State; or he

> shall be able to understand the same when read to him, or give a reasonable interpretation thereof. A new registration shall be made before the next ensuing election after January the first, A. D. 1892."

This "understanding" clause was unanimously adjudged by this court not to be in conflict with the fifteenth amendment.

The reasoning and the decision of this court in that case conclusively disposes of the main question attempted to be raised in these causes, and establishes the validity of the Virginia suffrage article.

In that case, the plaintiff attacked the validity of the Mississippi "understanding" clause upon substantially the same grounds urged by the appellants in this case, and this court said that the Constitution and the statutes of Mississippi "do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."

It would be impossible to conceive of a statute for the registration of voters under which evil administration would not be possible. Not only is this true, but it cannot be denied that there are very few, if any, States of our American Union the administration of whose registration and election laws has not been in many, though generally exceptional, instances characterized by partiality, favoritism, illegality, and sometimes by corruption, fraud, and crime.

This happens not because of any vice in the constitutions or statutes of these States, but because of the imperfection and weakness of human nature and the willingness of some registration and election officers, dominated by bitter political partisanship or by some sordid or venal consideration, to resort to lawless, corrupt, or criminal methods in order to control and carry elections in the interest of faction, of party, or of "the ring."

The vice in such cases is not in the laws, but in their administration. The laws are valid and constitutional, but their administration is, in such cases, illegal.

In the leading case of *Yick Wo* v. *Hopkins,* 118 U. S., 356, Mr. Justice Mathews, in delivering the opinion of this court, carries the doctrine of the effect of the maladministration of an otherwise valid law to the utmost limit, but he defines the proposition he formulates as a "principle of interpretation."

He says (at page 373):

> "Though the law itself be fair on its face and impartial in appearance, yet, if it be applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

This great jurist had already, in delivering the opinion of this court in that case, demonstrated and held that the ordinances of the city and county of San Francisco, impeached in that cause, were, upon their face, in conflict with the fourteenth amendment, because their manifest and necessary effect was to deprive Yick Wo and other persons in like position with him of their inalienable right to make a livelihood by the conduct of a lawful, honest, harmless, and useful business and trade; that these ordinances were shown by admitted facts to be plainly and illegally discriminating in their operations, and that the mode by which they deprived these Chinese laundrymen of their rights, guaranteed to them by the Federal Constitution and the law of the land, was none the less invalid, for the reason that it was accomplished through the agency of the supervisors of said city and county, because these officials accomplished the purpose of the ordinance, not by the discharge of any definite duty or the exercise of any legitimate and reviewable discretion, but in the unrestrained exercise of arbitrary power.

In describing the power of these supervisors, Mr. Justice Mathews says (at page 366):

> "The power given to them is not confided to their discretion, in the legal sense of that term, but is granted to their mere will. It is merely arbitrary, and acknowledges neither guidance nor restraint."

The facts developed as to the actual administration of the ordinances are referred to, in confirmation of the determination of the court as to the meaning and effect of the text of the ordinances, and the language cited above is used in the definition of the rule as to the propriety of interpreting laws in the light of their practical operation; but we do not understand the learned judge to hold, or this court ever to have decided, that a valid and constitutional law will be rendered unconstitutional and void by a vicious, lawless, or unconstitutional administration of such law.

A fair and reasonable construction of the language of Mr. Justice Mathews, quoted above, is that if a law, fair and valid on its face, "be applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust discriminations between persons in similar circumstances, material to their rights, the denial of equal justice" (by such evil administration of the law) "is still within the prohibition of the Constitution."

We are unwilling to believe that this court will ever take the illogical and fallacious position that any valid and constitutional enactment can ever be made unconstitutional and void by the unlawful, partial, and unconstitutional administration of such law. If so, there can hardly a law be pointed out, either Federal or State, which would not go down before such a rule; for there is no law, capable of being maladministered, which will not ordinarily be maladministered sometimes, and we know that the most salutary statutes are often so abused by those charged with the duty of their execution.

But, again, the case presented by the Virginia intelligence qualification for suffrage, whenever it shall be properly and

fairly brought under review in this court, will be found not to be included in the rule laid down by Mr. Justice Mathews, whatever the construction of that rule may be; for this court, in *Williams* v. *Mississippi,* 170 U. S. (at page 223), expressly held as to an "understanding" clause identical, as to the principle involved, with that of Virginia:

> "We do not think that this case is brought within the ruling in *Yick Wo* v. *Hopkins, Sheriff,* 118 U. S., 356."

It is further to be remarked that this clause of the Virginia Constitution is to be distinguished from the San Francisco anti-Chinese ordinances in this, that the Virginia enactment did not vest any arbitrary power in the officers who were to execute it, but clothed them with discretionary power, to be exercised fairly, justly, and impartially; devolved upon these registration officers a duty, coupled with this discretion, in the discharge of which duty their action could be reviewed and controlled by the courts; gives to any citizen whose rights are denied or abridged by any act of the officers of registration a simple, an inexpensive, and a summary remedy for the prompt redress of such wrong; and that the Virginia statute holds these registration officers to a strict accountability for any wilful infraction of duty, by denouncing and punishing any such misconduct as a crime.

Section 19 of the Constitution provides:

> "Any person denied registration under this section shall have the right of appeal to the Circuit Court of his county, or the Corporation Court of his city, or the judge thereof in vacation."

And section 7 of the registration ordinance is as follows:

> "Sec. 7. Any person denied registration shall have the right to appeal, without payment of writ

tax or giving security for costs, to the Circuit Court of the county or to the Corporation Court of the city in which he offers to register, or to the judge thereof in vacation, by presenting to such court or judge, within ten days thereafter, a petition in writing to have his right to register determined, containing a statement of the facts proved before said board; to which the board shall make answer in writing. The matter shall be heard and determined upon such petition and answer, and such evidence as may be introduced in support thereof. Such proceedings shall take precedence over all other business of the said court or judge, and shall be heard as soon as possible.

"Upon the filing of such petition, the clerk of the court shall at once give notice to the Commonwealth's attorney for his county or city, whose duty it shall be to appear and defend against said petition in behalf of the State.

"Judgment in favor of the petitioner shall entitle him to registration. From judgment rendered against him, a writ of error shall lie to the Supreme Court of Appeals in favor (of) the petitioner."

And section 3854 of the Code of Virginia punishes any fraudulent or wilful registration or refusal to register a qualified voter in the following terms:

"Sec. 3854. *Wilfully Rejecting or Corruptly Registering a Voter; How Punished.*—If any registrar wilfully or maliciously reject from registration, or corruptly register any person, contrary to law, he shall be fined not less than fifty nor more than one hundred dollars, and be confined in jail not less than three nor more than twelve months."

So that the Virginia suffrage article and her election laws, not only are not framed so as to be necessarily maladministered, but any wrongful administration of them—any administration of them "with an evil eye"—is guarded against and prevented by making and punishing such acts as crimes.

The "understanding" clauses of the Mississippi Constitution and of the Virginia Constitution have been criticised because of their alleged indefiniteness and capability of maladministration. I know of no provision in the Constitution of the United States which prohibits a State from adopting an indefinite qualification of suffrage. As has been already shown, the provision here referred to is an intelligence qualification.

It is a qualification certainly as reasonable and just and as capable of exact and impartial administration as the suffrage requirements of some of the other States of the Union. Let us consider some of these.

In Connecticut, the qualifications for suffrage have been, as I understand, since 1845, and substantially in its present form for more than a century, as follows:

> "Every white male citizen of the United States who shall have attained the age of twenty-one years, who shall have resided in this State for a term of one year next preceding, and in the town in which he may offer himself to be admitted to the privileges of an elector at least six months next preceding the time he may so offer himself, and SHALL SUSTAIN A GOOD MORAL CHARACTER, shall, on his taking such oaths as may be prescribed by law, be an elector."

In order to vote in that State, the citizen must not only possess these qualifications, but that fact must be passed upon by the selectmen of the town in which he lives before he can be admitted as an elector. The requirement that he "shall sustain a good moral character" is certainly as indefinite and

as liable to maladministration as the "understanding" clause of the Virginia Constitution.

In Minnesota, by the third subsection of section 1 of Article VII., the following classes of citizens are admitted as voters—viz:

> "*Third.* Persons of mixed white and Indian blood, *who have adopted the customs and habits of civilization.*
>
> *Fourth.* Persons of Indian blood residing in this State, who have adopted the language, customs, and habits of civilization, after an examination before any district court of the State, in such manner as may be provided by law, *and shall have been pronounced by said court capable of enjoying the rights of citizenship within the State.*"

And in Vermont, the qualifications for suffrage were, until recently, and so far as I can learn at present are, as follows:

> "Every man of the full age of twenty-one years, having resided in this State for the space of one whole year next before the election of representatives, *and is of a quiet and peaceable behavior,* and will take the following oath or affirmation, * * * shall be entitled to all the privileges of a freeman of this State."

In Idaho the restrictions upon suffrage are expressed in her Constitution as follows:

> "Sec. 3. No person is permitted to vote, serve as a juror, or hold any civil office who is under guardianship, idiotic, or insane, or who has at any place been convicted of treason, felony, embezzlement of the public funds, bartering or selling, or offering to barter or sell, his vote, or

purchasing, or offering to purchase, the vote of another, or other infamous crime, and who has not been restored to the rights of citizenship, or who at the time of such election is confined in prison on conviction of a criminal offense, or who is a bigamist or polygamist, or is living in what is known as patriarchal, plural, or celestial marriage, or in violation of any law of this State, or of the United States, forbidding any such crime; or who, in any manner, teaches, counsels, aids, or encourages any person to enter into bigamy, polygamy, or such patriarchal, plural, or celestial marriage, or to live in violation of any such law, or to commit any such crime; or who is a member of or contributes to the support, aid or encouragement of any order, organization, association, corporation, or society which teaches, advises, counsels, encourages, or aids any person to enter into bigamy, polygamy, or such patriarchal or plural marriages; or which teaches or advises that the laws of this State prescribing rules of civil conduct are not the supreme law of the State; nor shall Chinese, or persons of Mongolian descent, not born in the United States, nor Indians not taxed, who have not severed their tribal relations and adopted the habits of civilization, either vote, serve as jurors, or hold any civil office."

Other suffrage articles adopted in the past by the free States of this Union, and some that are now administered without question, have been equally indefinite or exacting in their requirements with those embraced in Article II. of the Virginia Constitution, and equally susceptible of maladministration.

A comparison of those which I have cited—particularly that of the good State of Connecticut, and that of the Green Mountain State—with the Virginia suffrage clause, will show that the latter is no more obnoxious to criticism, and is as

clearly within the competency of State enactment as those which now for quite a hundred years have regulated the elective franchise in the States referred to.

This discussion has been confined to the qualifications for suffrage prescribed for the voters regstered in 1902 and 1903, under the registration ordinance and section 19 of the Constitution, which are the only provisions which are attacked in these suits.

It will be observed that those requirements no longer apply after 1903. After January 1, 1904, the qualifications for registration and voting are defined in sections 20, 21, and 22 of the Constitution, as follows:

> "Sec. 20. After the first day of January, nineteen hundred and four, every male citizen of the United States, having the qualifications of age and residence required in section eighteen, shall be entitled to register: provided—
>
> "First. That he has personally paid to the proper officer all State poll taxes assessed or assessable against him, under this or the former Constitution, for the three years next preceding that in which he offers to register; or, if he come of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents in satisfaction of the first year's poll tax assessable against him; and,
>
> "Second. That, unless physically unable, he make application to register in his own handwriting, without aid, suggestion, or memorandum, in the presence of the registration officers, stating therein his name, age, date and place of birth, residence and occupation at the time and for the two years next preceding, and whether he has previously voted, and, if so, the State, county, and precinct in which he voted last; and,

"Third. That he answer on oath any and all questions affecting his qualifications as an elector submitted to him by the officers of registration, which questions, and his answers thereto, shall be reduced to writing, certified by the said officers, and preserved as a part of their official records.

"Sec. 21. Any person registered under either of the last two sections, shall have the right to vote for members of the General Assembly and all officers elective by the people, subject to the following conditions:

"That he, unless exempted by section twenty-two, shall, as a prerequisite to the right to vote after the first day of January, nineteen hundred and four, personally pay, at least six months prior to the election, all State poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote: provided, that if he register after the first day of January, nineteen hundred and four, he shall, unless physically unable, prepare and deposit his ballot without aid, on such printed form as the law may prescribe; but any voter registered prior to that date may be aided in the preparation of his ballot by such officer of election as he himself may designate.

"Sec. 22. No person who, during the late war between the States, served in the army or navy of the United States, or the Confederate States, or any State of the United States, or of the Confederate States, shall at any time be required to pay a poll tax as a prerequisite to the right to register or vote."

* * * * * * *

The present and permanent requirements are simply that the citizen shall (1) be able to read and write, and, as a test of this, shall make application in his own handwriting, without aid from anyone, to be registered, and shall answer all questions affecting his qualifications as an elector, and (2) that he shall have paid the State poll tax of $1.50, assessed or assessable against him, for the three preceding years.

These requirements apply to all persons alike. Those who failed to apply for registration, or who were rejected in 1902 or 1903, may still apply, and if they have paid the prescribed poll taxes, and make written application to be registered, they are entitled to be registered this year, or next year, or at any future time. The door is always open to them, provided they comply with the definite requirements prescribed for all registrations after 1903.

In concluding this branch of the discussion, I may be permitted to say that the argument for the appellants is founded upon the fallacy that the right to vote is a natural, a primary, and an absolute right. It is unnecessary in this court to refute such a proposition, for it is, and has been too often, settled that suffrage is a relative, and a purely statutory right, which is the possession of only those upon whom organized society, or the State, may see proper to confer it. If this were not true, all of the members of the body politic, of whatever age, or sex, or mental status, would be entitled to an equal voice in the government. Under the fundamental law of this representative republic, the State has the right to deny this power to any of its citizens whom it considers that it would be unsafe or unwise to entrust with its exercise; and the only limitation upon this right is that it shall not be used so as to exclude from suffrage any citizen merely on account of his race, or his color, or his previous condition of servitude.

III.

I have thus, as succinctly as was practicable, reviewed all of the main contentions of appellants' counsel.

From this refutation of the propositions for which he contends, it follows necessarily that the Constitution of 1901-2 is the Constitution of the Commonwealth of Virginia; that the suffrage article embraced in that Constitution, being absolutely free from any discrimination on account of race, color, or previous condition of servitude, is a valid and constitutional exercise of the power of the State over that subject; and, as a consequence, that the registration ordinance, and the registration of voters made thereunder, and the election held under the laws of Virginia in November, 1902, were legal and constitutional.

It is proper that I should add here that the registration ordinance adopted by the convention was not only recognized, but, in its most material particulars, re-enacted and adopted by the *de jure* Legislature of the State, at its session in July and August, 1902, thus giving them the sanction, not only of the convention, but also of the General Assembly.

IV.

This brings us to consider the question of the right of these plaintiffs to maintain these suits. In the foregoing portion of this argument, I have endeavored to show that the provisions of the Virginia Constitution complained of did not invade any of the rights of the appellants or of any other citizens of the Commonwealth.

As to these particular complainants, it is a remarkable circumstance in these cases that none of the complainants in either of these suits was disfranchised by the new Constitution of Virginia. Every one of them, except Gilpin, according to the averments of their bill and petition, came within the terms of one or the other of the clauses prescribing automatic qualifications, and was entitled to be registered and to vote. In

the prohibition suit, Jones and Hill were owners and taxpayers as to property valued at $800 and $500, respectively. Lee, the remaining plaintiff in that action, was a veteran of the Indian wars. See p. 12 of Record, in Case No. 189. And of the appellants in the suit in equity, Anderson was a veteran of the Spanish-American War, and was actually registered as such, though with the wrong initial; Selden owned and paid taxes on $1,500 worth of real estate; and Gilpin, upon the allegations of the bill, was qualified under the intelligence clause.

Conceding, for the moment, for the purpose of argument, that the plaintiffs have been deprived of their right to vote on account of race, color, or previous condition of servitude, it is confidently submitted that they have mistaken their remedy for the redress of any such alleged wrong. This will abundantly appear from an application of the principles so often settled by this court, but never more clearly than in the case of *Cunningham* v. *Railroad Co.*, 109 U. S., 446, relied upon in our brief and cited at page 70 of appellants' brief.

In proposition No. 2, of Mr. Justice Miller, who delivered the opinion in that case, he says:

> "2. Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government.
>
> "In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him."

The appellants' counsel relies upon this doctrine. It is sufficient to say, in reply, that neither of these cases comes within the rule laid down by the learned judge, *for the simple reason that neither of these suits is an action of tort.*

There can be no question that, in a proper case, an action for damages against election officers would lie, as was settled by this court in *Wiley* v. *Sinkler,* 179 U. S., 58, and in *Swafford* v. *Templeton,* 185 U. S., 487. And such an action is the proper and only remedy in the United States Circuit Courts in any such case.

The third proposition of Mr. Justice Miller is as follows:

> "3. A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process."

And neither of these cases can be brought within the limits of the rule thus clearly laid down.

The duty and function of the State Board of Canvassers, with the discharge of which it was the object of these suits to interfere, cannot be considered duties in regard to a specific matter not affecting the general powers or functions of the government; nor were they duties in the performance of which one or more individuals have *a distinct interest capable of enforcement by judicial process;* but they were matters of purely governmental concern, affecting the interest of the whole people, not only of each congressional district, but of the entire State and of the entire nation.

The counsel for the plaintiffs has failed to draw the distinction between actions in tort and suits in prohibition, and between actions of tort and a suit in equity, and his entire contention is based upon his failure to distinguish between civil rights and political rights.

The rights here sought to be asserted are not, and have never been held to be, civil rights; though, under the act of Congress, as shown in our preliminary brief, the wilful and wrongful

deprivation of a citizen of his right to vote in any particular instance, constitutes a tort, for the redress of which the citizen, so wrongfully deprived, may have his action for damages in a proper case in the United States Circuit Courts against the wrongdoer; but Congress has never conferred upon the Circuit Courts of the United States jurisdiction in a suit in equity over political questions and governmental questions. And such is the character of the jurisdiction which the appellants would seek to invoke in this case. In all such cases the Constitution and the laws of Congress have wisely left the entire control of the subject, in so far as the Federal Government is vested with the right to control it, with the political departments of the government, which alone can decide whether the State has a government republican in form, and take measures to make good that guarantee of the National Constitution. And such seems to be the wise and just conclusions of this court in *Cunningham* v. *Railroad Co.*, 109 U. S., 446; *Louisiana* v. *Jumel*, 107 U. S., 711; *Hagood* v. *Southern*, 117 U. S., 52, and in the recent cases of *Giles* v. *Harris*, 189 U. S., 475.

The rule, as clearly stated by Mr. Justice Harlan in *Fitts, Attorney-General of Alabama*, v. *McGhee*, 172 U. S., 516, 529, 530, aptly applies to this litigation.

> "There is a wide difference between a suit against individuals holding official positions under a State to prevent them, under the sanction of an unconstitutional statute, from committing, by some positive act, A WRONG OR TRESPASS, *and a suit against officers of a State merely to test the constitutionality of a State statute* (italics mine) in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the State officers held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because

> they were law officers of the State, a case could be made out for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the Legislature could be tested by a suit against the Governor and Attorney-General, based upon the theory that the former, as Executive of the State, was, in a general sense, charged with the execution of all its laws, and that the latter, as Attorney-General, might represent the State in litigation involving the enforcement of its statutes. *That would be a very convenient way for obtaining a judicial determination of questions of constitutional law which may be raised by individuals; but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their consent, be brought into any court at the suit of private persons.* (Italics mine.) If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrong."

Here it would have been impossible for the defendants in the court below to have done any act, in the discharge of the official and governmental functions devolved upon them as members of the State Canvassing Board, which would have constituted a tort or trespass upon any right of any of these complainants.

None of the complainants could have any distinct personal interest in the canvassing and return of the votes cast at the congressional election held in Virginia in November, 1902. The candidates for Congress in the several Virginia districts alone had any distinct personal interest in that matter. The only interest which any of the complainants could have had in

the premises was one of a general and public character, not personal to them, but possessed in common with all of the other citizens of the Commonwealth. Any injury to any such common, general, and public interest could not constitute a personal trespass or tort in respect to any individual citizen, to be redressed by an action for damages, or prevented by injunction in equity, or by writ of prohibition, for the conclusive reason, among others, that the individual citizen has no distinct personal interest in the subject.

If any other rule should be adopted, the very wheels of government might at any time be stopped at the suit of any individual who had a fancied or a real grievance because of the administration of some obnoxious law.

THE PROHIBITION SUIT.

I need not consume time in showing that this action could not be entertained by the court below. As shown in our brief in that case, the authorities establish the proposition that no court, and particularly no Federal court, has jurisdiction of a writ of prohibition in any such case.

High on Extraordinary Remedies, sections 787, 787*a*;
Bath County v. *Amy*, 13 Wall., 244;
Ex Parte City Bank of New Orleans, 3 How., 292, 322;
Louisiana v. *Jumel*, 107 U. S., 727;
2 Spelling Extraordinary Relief, sections 1367, 1722, 1732, and 1737;
1 Desty Fed. Procedure (9th Ed.), section 84, p. 341, and citations;
Burch v. *Hardwicke*, 23 Gratt., 51, 60.

As has already been shown, however, the right of neither the plaintiffs nor of any other citizens of the State to vote has been abridged or denied by the terms or normal and lawful opera-

tion of the suffrage article of the Virginia Constitution, on account of race, color, or previous condition of servitude.

V.

I have not deemed it necessary to reply to the fierce assault made by counsel for the appellants upon the members of the Constitutional Convention who voted to ordain the Constitution, nor to much of that portion of his discussion of this case, which smacks of the bitterness of party and partisan politics, and can have no proper place in this court, and no possible proper bearing upon the great questions of constitutional law presented by the records of these cases.

In reference to the charge of perfidy made against those delegates, I will only say that it is made against gentlemen of as exalted character as can be found anywhere on earth, and that the charge is founded upon an absolute misapprehension of the facts and of the relations of those gentlemen to the subject and to their respective constituents. They were not chosen as members of the Constitutional Convention by any convention of any political party. The unit of representation of that convention was the legislative district; and each delegate to that convention was there as the deputy of the people of the district by whose votes he was chosen. They were not chosen by the State Convention of any party, and were not accountable to any such convention, but to the people of their respective districts. Many of them were elected upon the distinct understanding between them and the constituencies who selected them that if a satisfactory Constitution should be framed by the convention—a Constitution which, in the judgment of the delegate, protected the liberties and promoted the welfare of the State—the delegate would vote to ordain the Constitution. Although nearly two years have elapsed since that Constitution was enacted by the convention, it is a part of the history of the State that it has never been shown, or attempted to be shown, that a single delegate who voted for its enactment violated any pledge or assurance given to the con-

stituency which he represented, or any instructions, express or implied, given by them to him.

The resolution for the ordainment of the Constitution by the convention, as the journal of the convention shows, met the sanction not only of the forty-seven members whose votes were recorded in the affirmative upon that proposition, but also of six other members who were paired upon that question with six of the opponents of proclamation. So that, as the journal of the convention shows, fifty-three out of the ninety-eight delegates whose judgment was expressed upon the question were in favor of the enactment of the Constitution; and two out of the twelve Republican members of the convention were recorded among those voting for proclamation.

The resolution for the enactment of the Constitution was passed on the 29th of May, 1902. Afterwards, upon the 6th of June, 1902, as appears from the journal of the convention, the Constitution, which had then been practically ordained, was approved as the organic law of the Commonwealth by a vote of ninety to ten. So that the Constitution as a whole and in all of its provisions received the affirmative sanction of nine-tenths of the members of the convention; though, as appears from the journal of the convention, only fifty-three of those members were in favor of its ordainment by the convention.

These are matters which have little, if any, bearing upon the questions at issue, and are referred to only because of the erroneous statements and conclusions of the counsel for the appellants in regard to them.

VI.

The immediate and the remote consequences involved in the decision of the issues here outlined are so momentous that they challenge the most earnest consideration of the jurist, the patriot, and the philanthropist.

It is true that they involve the question of suffrage, so far as the right to its exercise is based upon intelligence, the possession of property, or upon military service in time of war. In this way it affects the descendants of the African and of the

Caucasian races without any unconstitutional discrimination; for the State, in making any distinction, has seized upon characteristics which are, in a large degree, possessed by both races. But its adjudication will not only in this way affect the subject of Caucasian suffrage and African suffrage in the States of the American Union, but it will affect the question also of Mongolian and Malayan suffrage, which is looming up into portentous importance upon the horizon of the future.

In its determination this court will be asked to pronounce the Constitution and the suffrage article, deliberately framed by the deputies of the Virginia people, to be unconstitutional and void, and thereby to bring about a condition of chaos in that Commonwealth, with results the disastrous effects of which it would be difficult to exaggerate.

We know that this court should not, and will not, hesitate to decide any question of which it has adequate jurisdiction, according to the right—even one involving such consequences—where the unconstitutionality of a law has been clearly established. But we most earnestly submit that it will not do this in any case of doubt; that, even if it was not manifest, as we believe it to be here, that there is no discrimination in this suffrage article on account of race, or color, or previous condition of servitude, this court would pause before it would hold such an act of a State to be unconstitutional.

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." Mr. Chief Justice Waite, in Sinking-Fund Cases, 99 U. S., 718.
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> "The courts should not declare a statute unconstitutional unless its unconstitutionality is clear beyond any reasonable doubt." Allen, J., in *People* v. *Allenston*, 55 N. Y., 54.

Such is the established rule which governs in the construction of an ordinary statute enacted by the Legislature of a State.

How much more strongly do the principles upon which it is founded apply to the solemn and deliberate enactment of any provision of their organic law by the delegates of a people in convention assembled!

Such an enactment must stand "unless its unconstitutionality is clear beyond any reasonable doubt."

Still less will the courts adjudge the enactment to be invalid where, as is the case here, it is manifestly not in contravention of the Federal Constitution.

CONCLUSION.

It is impossible to calmly and dispassionately consider the questions here discussed without being forced to the conclusion that they are questions of a political character, affecting not only governmental action, but the fundamental political rights of the people of the State, and their relations to their governments, State and national, in such a manner and to such a degree that any adequate relief is entirely outside of the province of the courts; and that the remedy in any such case, if a wrong has been perpetrated, can only be afforded and administered by the political department of the government, or by the people themselves in their organized political capacity.

The arguments and considerations which should determine the action to be taken are such as address themselves to the legislative mind, and are not such as can be given due effect by a purely judicial tribunal.

Such matters are clearly within the domain of political and legislative action, where, however injurious the consequences of the measure adopted may be, certain political and probable social chaos and confusion and disaster can alone be remedied or mitigated.

It is right, therefore, that the courts should not take jurisdiction of this case, or of any other case involving the political rights, the existence of the organized government, and the governmental functions of the people of a State within the sphere of State action and jurisdiction.

For Virginia, the real defendant in these suits, I ask leave to say that it is one of the thirteen original sovereign States of the American Union which has been attempted to be arraigned as a culprit here—one of those heroic Commonwealths in the very blood of whose sons the foundations of that Union were cemented.

A great historian, perhaps the most philosophic and the most discriminating, as well as the most accurate, of all who have written the story of the birth and growth of this great Republic of free American Commonwealths, the lamented John Fiske, a son of New England, reared in a New England environment, trained in the culture of New England schools, with a mind exact in the comprehension and intrepid in the cause of truth, has written that, there were six men who could be selected from their contemporaries and named as the real architects of the American Republic. Shall I repeat their names as he has written them, and as they must be forever blazoned across the pages of truthful history? They are Washington, Madison, Hamilton, Jefferson, Henry, and Marshall. Five of these six immortals were the sons of that Commonwealth which counsel for appellants would have this court degrade by a decree declaring that she occupies an inferior position in the sisterhood of States—the Republic which she, in large measure, created.

Is any man bold enough in imagination to suppose that such suits as these would ever have been brought against the great States of New York, or Massachusetts, or Pennsylvania, or against the States of Connecticut, or Rhode Island, which though small in territory, are great also in the achievements of their sons in the cause of liberty and progress?

Freedom—freedom of governmental action within the legitimate field of State control, freedom from any ban of political proscription, absolute freedom within the domain of local self-

government—is essential to the normal growth and the untrammelled development of a State and its people.

Without such freedom of action, the Commonwealth must be dwarfed and weakened, and handicapped in any upward progress.

If the shackles which counsel for appellants has forged and would have this court fasten upon the fair free limbs of Virginia, and to chain her to the body of an ignorant, debased, and incompetent electorate, are broken and crushed forever by its decision in these causes; if, by your decree and by the concurrent action of the political departments of the National Government, she is bid go free from threatened humiliation, and her people given this guaranty, that she is, in fact as well as in theory, the acknowledged peer of any other State of this Union of States, then will her people take fresh hope, and with new life and high ambition advance upon a career of patriotic usefulness and economic achievement, so that in the not very distant future we may confidently hope to see this ancient Commonwealth, venerable in years but young in the vigor and the potentialities of her present and her future, leap to her rightful place in the front rank among the States of the Republic—her sons, as of yore, illustrious in patriotic service, foremost in the counsels of the nation, gloriously leading its army, or commanding its battle-ships in righteous and victorious war, perchance worthily wearing the ermine as members of this august tribunal, or wielding ably, bravely, wisely, and well, for the common good of all the people of all the States, the great powers of the Chief Executive of our reunited country.